

1999

Carol Lynn Adamson v. Ted Jay Adamson : Brief of Appellant

Utah Court of Appeals

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George K. Fadel; attorney for appellee.

Alan R. Stewart; attorney for appellant.

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IN THE COURT OF APPEALS OF THE STATE OF UTAH

CAROL LYNN ADAMSON, :
 : Appellate Case No. 990931CA
Petitioner and Appellee, :
 : Trial Court No. 924701125
Vs. :
 :
TED JAY ADAMSON, :
 : Priority No. 15
Respondent and Appellant. :
 :

BRIEF OF APPELLANT

APPEAL FROM JUDGMENT OF THE SECOND JUDICIAL DISTRICT COURT
OF DAVIS COUNTY, STATE OF UTAH
THE HONORABLE JON M. MEMMOTT

Alan R. Stewart
1366 East Murray-Holladay Road
Salt Lake City, Utah 84117
Attorney for Appellant

George K. Fadel
170 West 400 South
Bountiful, Utah 84010
Attorney for Appellee

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COURT OF APPEALS

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170 West 400 South
Bountiful, Utah 84010
Attorney for Appellee

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Appellant, Ted Jay Adamson, pursuant to Rule 24 of the Utah Rules of Appellate Procedure, submits this Appeal Brief.

JURISDICTIONAL STATEMENT

The Utah Court Of Appeals has jurisdiction pursuant to Utah Code Annotated § 78-2a-3(2)(h). The order appealed from is a final order disposing of all claims of all parties.

ISSUES PRESENTED ON APPEAL

Did the trial court commit an error of law in deciding it does not have jurisdiction and authority to modify the property award in the parties' Decree of Divorce?

Did the trial court commit an error of law in failing to distinguish that the benefits Respondent is currently receiving are disability benefits and hence his separate property rather than retirement benefits awarded in the decree?

STANDARD OF APPELLATE REVIEW

Since a summary judgment is granted as a matter of law rather than fact, the appellate court reviews the trial court's conclusions for correctness and to determine whether there has been an error of law, without according deference to the trial court's legal conclusions. *Barber v. Farmers Ins. Exch.* 751 P.2d 248 (Utah Ct App. 1988); *Bonham v. Morgan*, 788 P.2d 497 (Utah 1989).

DETERMINATIVE AUTHORITY

The determinative statutory authority for this appeal is Utah Code Annotated § 30-3-5(3).

STATEMENT OF THE CASE

1. Nature of Case

This appeal is from a final order of the Second Judicial District Court, Honorable Jon M. Memmott granting the Petitioner's Motion For Summary Judgment on Respondent's Petition To Modify Decree of Divorce.

2. Course of Proceedings

The parties were divorced by a Decree of Divorce entered by the Second District Court on November 30, 1992. On January 29, 1998 Respondent filed a petition to modify the award of retirement benefits based upon Respondent's severe disability sustained subsequent to entry of the Decree of Divorce. Petitioner filed a motion for summary judgment pursuant to Rule 56(c) of Utah Rules Of Civil Procedure.

3. Disposition in the Lower Court

The court granted Petitioner's motion for summary judgment, ruling that, as a matter of law, Respondent was not entitled to modification of the Decree.

STATEMENT OF FACTS

1. The parties were divorced by a Decree of Divorce entered by the Second District Court on November 30, 1992. The Decree of Divorce was based upon a Stipulation and Property Settlement Agreement signed by the parties. (Paragraph 1, Statement of Facts of Respondent's Memorandum In Opposition To Motion For Summary Judgment).

2. In the Decree the Petitioner was awarded a one-half (1/2) interest in Respondent's retirement benefits accrued during the marriage. (Paragraph 2, Statement of Facts of Respondent's Memorandum In Opposition To Motion For Summary Judgment).

3. At the time of the divorce, the Respondent was 42 years old and worked as a licensed plumber. (Paragraph 3, Statement of Facts of Respondent's Memorandum In Opposition To Motion For Summary Judgment)

4. At the time of the divorce, the Respondent did not contemplate drawing on his retirement pension fund until he retired at 62 years of age. (Paragraph 4, Statement of Facts of Respondent's Memorandum In Opposition To Motion For Summary Judgment)

5. On May 1, 1995, Respondent, while working, fell two

stories onto cement and sustained a serious spinal cord injury. Respondent does not have the use of his legs and is confined to a wheel chair. The Respondent also has only limited use of his arms. The Respondent is no longer capable of employment and is no longer able to earn sufficient income to maintain his basic living expenses. (Paragraph 5, Statement of Facts of Respondent's Memorandum In Opposition To Motion For Summary Judgment)

6. In February, 1996, as a result of his disability, the Respondent qualified for early payments from his retirement and pension funds. He has been receiving \$578.00 per month from the Utah Pipe Trades Pension Trust Fund and \$610.00 per month from the Plumbers & Pipefitters National Pension Fund. These payments will be made to the Respondent for the rest of his life. The Respondent also is receiving Social Security disability payments. (Paragraph 6, Statements of Facts of Respondent's Memorandum In Opposition To Motion For Summary Judgment)

7. Had it not been for Respondent's unfortunate injuries, the Respondent would not have been eligible to receive retirement benefits from his retirement pension funds until he reached 62 years of age. (Paragraph 7, Statement of Facts, Respondent's Memorandum In Opposition To Motion For Summary Judgment)

8. Prior to the accident, the Respondent was earning \$3,000.00 to \$4,000.00 per month. (Paragraph 8, Statement of Facts of Respondent's Memorandum In Opposition To Motion For Summary Judgment)

SUMMARY OF ARGUMENT

Summary Judgment should be granted only when the evidence, considered in a light most favorable to the non-moving party, demonstrates that there are no genuine issues of material fact and that the moving party is entitled to judgment as a matter of law. The lower court granted Petitioner's motion for summary judgment on the basis that, as a matter of law, it could not modify the property award to exclude Respondent's disability payments from distribution in the Decree of Divorce. Hence, Respondent never even got to the question of whether there had been a change of circumstance since entry of the decree. The trial court simply ruled it did not have authority.

The applicable statute is clear that courts have continuing jurisdiction to make subsequent changes in divorce decrees for the distribution of property. Moreover, the benefits that the Respondent is currently receiving are disability benefits and as such are not marital property subject to distribution in

the decree. It is submitted that the lower court erred in granting Petitioner's motion for summary judgment and that as a matter of law, the lower court has continuing jurisdiction to modify the Decree of Divorce as requested by the Respondent. As such the case should be remanded for a determination on the threshold question as to whether there has been a substantial and material change of circumstance.

ARGUMENT

POINT I

BASIS FOR REVIEW

Summary Judgment is proper when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Utah Rules of Civil Procedure, Rule 56(c). In the case at hand, the district court ruled that it did not, as a matter of law, have the authority to modify the property division in the decree, as requested by Respondent. The Respondent contends the district court does have continuing jurisdiction to modify property awards, to include the retirement annuity.

POINT II

THE COURT HAS CONTINUING JURISDICTION TO MODIFY PROVISIONS IN A DECREE OF DIVORCE REGARDING DIVISION OF PROPERTY

Case law, as well as state statute authorizes a court to modify property distributions. Utah Code Ann. 30-3-5(3) provides as follows:

The Court has continuing jurisdiction to make subsequent changes or new orders for the custody of the children and their support, maintenance, health and dental care and for **distribution of the property** and obligations for debts as is reasonable and necessary. (emphasis added).

A trial court may modify the division of property in a stipulated divorce decree under a showing of a substantial change of circumstances since entry of the decree and not contemplated in the decree itself *Hill v. Hill*, 968 P.2d 866 (Utah Ct. App. 1988); *Whitehouse v. Whitehouse*, 790 P.2d 57, 61 (Utah Ct App 1990); *Williams v. Sherwood*, 688 P.2d 475, 476 (Utah 1984); *Sundquist v. Sundquist*, 639 P.2d 181 (Utah 1981) (reallocation of property rights in installment payments of income from real property).

In *McCrary v. McCrary*, 599 P.2d 1248, 1250 (Utah 1979), the Supreme Court stated the following

Under Utah law, a trial court granting a Decree of Divorce is afforded considerable discretion in the area of property distribution . . . the court has continuing jurisdiction over the parties with regard to the

decree, enabling it to make subsequent modifications as are equitable. The breadth of discretionary power given the trial court in the initial determination of the property division extends in equal measure to these subsequent modifications.

In other cases the Utah Supreme Court has stated that, while the court has continuing jurisdiction to modify property settlements, such should be resorted to with "great reluctance and for compelling reasons". *Land v. Land* 605 P.2d 1248, 1251 (Utah 1980); *Whitehouse v. Whitehouse supra* at 61.

In *Whitehouse v. Whitehouse*, the trial court modified the distribution of equity in the marital home and timing of pay out of a retirement program.

In the present case, at the time of entry of the decree, the parties were contemplating that Petitioner would begin receiving her share of Respondent's retirement benefits only when the Respondent reached 62 years of age, the age when Respondent could begin receiving retirement benefits under his retirement plan. The parties did not contemplate any other circumstance wherein Respondent would begin receiving benefits from his retirement pension funds prior to Respondent reaching 62 years of age. The decree is silent on this issue. The Respondent's injuries subsequent to entry of the Decree were not contemplated by the decree. The Respondent's severe and debilitating injuries represent a substantial change in circumstances from the circumstances that existed at the time the decree was entered. In

addition, Respondent's injuries represent a compelling reason for the decree to be modified to provide for the circumstance that the parties now find themselves in.

POINT III

THE BENEFITS THAT THE RESPONDENT IS CURRENTLY RECEIVING ARE DISABILITY BENEFITS AND ARE NOT A MARITAL ASSET SUBJECT TO EQUITABLE DISTRIBUTION IN THE DECREE OF DIVORCE

The appellate courts in many states have held that disability payments, intended to compensate the employee for lost earning capacity, are not marital property subject to equitable distribution between the parties in a divorce. *Ciliberti v. Ciliberti*, 374 Pa.Super. 228, 542 A. 2d 580 (Pa.1988); *Allard v. Allard*, 708 A. 2d 554 (Rhode Island 1998); *In Re Marriage of Stenquist*, 21 Cal.3d 779, 148 Cal. Rptr, 9, 582 P.2d 96 (Ca. 1978); *In Re Hoag*, 122 Or. App 230, 857 P. 2d 208 (Ore. 1993); *Queen v. Queen*, 308 Md. 547, 521 A. 2d 370 (Md. 1987); *Avallone v. Avallone*, 275 NJ Super.575, 646 A. 2d 1121 (N.J.1994); *Freeman v. Freeman*, 468 So.2d 326 (Fla.1985); Courts have been willing to look behind the labels of "retirement benefits" and "disability benefits" to determine the true nature of the benefits that are received by the recipient of the benefits. *Ciliberti v. Ciliberti, supra*, *Allard v. Allard, supra*; *Avallone v. Avallone, supra*. Retirement benefits are generally considered deferred compensation for past service, and are therefore

considered to be a marital asset subject to distribution upon dissolution of the marriage. *Knies v. Knies*, 979 P. 2d 482 (Washington 1999). In contrast, disability benefits compensate for lost earnings resulting from a diminished capacity to compete in the employment market. *Allard v. Allard*, *supra*. "Disability benefits may serve multiple purposes. They may compensate for the loss of earnings resulting from compelled premature retirement and from a diminished ability to compete in the employment market. Disability benefits may also serve to compensate the disabled person for personal suffering caused by the disability." *Ciliberti v. Ciliberti*, *supra*, at 233, quoting *In Re Marriage of Stenquist* *supra*, at 101.

As such, disability benefits are the injured party's sole property and are not subject to distribution upon the dissolution of the marriage.

Losses incurred after entry of final divorce, including future loss of wages, future medical expenses and future loss of earning capacity are the injured spouse's separate property and not subject to equitable distribution upon dissolution of the parties marriage.

Allard vs. Allard, *supra*.

In this matter, payments received by the Respondent are in lieu of earnings that would have been paid to him if he had been able to work. Therefore, the payments received by the Respondent are disability payments, and as such are the

Respondent's separate property and are not subject to distribution to the Petitioner.

In *Avallone, supra* the husband had vested rights in a retirement pension, but had not completed the necessary years of service. Therefore, his right to receive the retirement pension had not matured. The husband was eligible for retirement benefits when he reached fifty five years of age, but was only forty four years of age when he became disabled. The court ruled that payments to the husband were disability benefits, and thus were not subject to division with the wife.

These facts are similar to the facts in this case. Respondent would have been eligible to receive retirement benefits twenty years after the disability occurred. Therefore, Respondent's rights to receive retirement benefits had not yet matured when the disability occurred. To allow the Petitioner to share in the Respondent's disability benefits provides an unexpected windfall for the Petitioner, and a financial hardship for the Respondent.

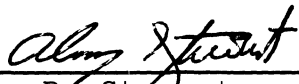
Respondent is not seeking to divest the Petitioner of her share in Respondent's actual retirement benefits. Respondent agrees that the Petitioner should share in the retirement benefits as contemplated by the Decree, i.e., when the Respondent reaches 62 years of age, and would be eligible for retirement benefits according to the provisions of his

retirement plan.

CONCLUSION

The lower court erred in granting summary judgment to Petitioner. As a matter of law, Respondent's disability benefits are not a marital asset subject to distribution with Petitioner. Therefore Respondent is entitled to modify the Decree of Divorce to exclude Respondent's disability benefits from distribution in the decree of divorce.

DATED this 29th day of June, 2000



Alan R. Stewart
Attorney for Appellant

CERTIFICATE OF MAILING

I hereby certify that the BRIEF OF APPELLANT was sent via First Class U.S. Mail, postage prepaid, this 29th day of June, 2000 to the following counsel of record:

George K. Fadel
170 West 400 South
Bountiful, Utah 84010
Attorney for Appellee



Addendum #1

Copy of Summary Judgment Order

George K. Fadel #1027
Attorney for Plaintiff
170 West 400 South
Bountiful, Utah 84010
Telephone: 295-2421

SEP 27 10 33 AM '99

IN THE SECOND DISTRICT COURT OF DAVIS COUNTY,
STATE OF UTAH

| | | |
|---------------------|---|------------------------------|
| CAROL LYNN ADAMSON, |) | |
| Plaintiff, |) | SUMMARY JUDGMENT DENYING |
| |) | DEFENDANT'S MOTION TO MODIFY |
| vs. |) | DECREE OF DIVORCE |
| TED JAY ADAMSON, |) | Civil No. 9247001125 DA |
| Defendant. |) | Judge Jon M. Memmott |

The hearing on Plaintiff's motion for summary judgment denying defendant's petition for modification of decree of divorce, came on before the Honorable Jon M. Memmott, District Judge, on Tuesday the 24th day of August, 1999. Plaintiff appeared in person and by counsel, George K. Fadel. Defendant appeared in person and by counsel Alan R. Stewart. The Court having read the memoranda filed by the parties and hearing the arguments of counsel, and having heretofore made and entered Findings of Fact and Conclusions of Law, and it appearing that Summary Judgment should be entered pursuant to Rule 56, Utah Rules of Civil Procedure, in that the pleadings, decree and other information contained in the record show that there is no genuine issue as to any material fact and the plaintiff is entitled to judgment as a matter of law, now therefor:

IT IS ORDERED, ADJUDGED AND DECREED THAT:

1. The QUADRO as amended is res judicata as to the entitlement of the parties to retirement benefits of the defendant, and the Court is without jurisdiction to modify the QUADRO as to the plaintiff's entitlement pursuant to the Decree of Divorce entered in this cause.

2. Summary Judgment is hereby entered denying the defendant's motion to modify the decree of divorce.

3. No costs are awarded either party.

Dated this 24th day of September, 1999.


BY THE COURT

Jon M. Memmott

DISTRICT JUDGE

CERTIFICATE OF MAILING

I certify that on the 26th day of August, 1999, I mailed a copy of the Findings and Judgment relating to the petition for modification of the decree of divorce to Mr. Alan R. Stewart, attorney for the defendant-respondent, 1366 East Murray-Holladay Road, Salt Lake City, Utah 84117.



GEORGE K. FADEL